

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

NOV 26 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Respondent,

v.

DAVID ANTHONY MARTINEZ,

Petitioner.

2 CA-CR 2008-0142-PR  
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication  
Rule 111, Rules of  
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044303

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Barton & Storts, P.C.  
By Brick P. Storts, III

Tucson  
Attorneys for Petitioner

PELANDER, Chief Judge.

¶1 In this petition for review, David Anthony Martinez challenges the trial court's summary dismissal of the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P.

¶2 After a 2005 jury trial, Martinez was convicted of molesting a victim younger than twelve, a dangerous crime against children. The trial court sentenced him to prison for a mitigated, ten-year term. After this court affirmed the conviction and sentence on appeal, *State v. Martinez*, No. 2 CA-CR 2006-0019 (memorandum decision filed Feb. 1, 2007), Martinez filed a notice of post-conviction relief pursuant to Rule 32. The trial court appointed counsel, who filed a petition alleging that both trial and appellate counsel had rendered ineffective assistance. The court denied relief without a hearing, and this petition for review followed. We will disturb the court’s ruling only if it constitutes a clear abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶3 We stated the following essential facts in our memorandum decision on appeal. The ten-year-old victim, B., was at home watching a movie with her younger brother, N. Also in the house were their two older brothers and friends of the older brothers’, including Martinez.

B. fell asleep on the couch under a sheet; she awoke to find Martinez kneeling beside the couch with his head under the sheet. B. knew it was Martinez because “he [was] the only one that ha[d] a bald head.” Martinez reached through the leg opening of B.’s shorts and touched her “private part.” He also touched B.’s “butt.” B. “slapped his head and told him to stop.” N., nine at the time of trial, testified he had fallen asleep during the movie and woke up when Martinez was under the sheet and touching B. N. confirmed that B. had slapped Martinez’s head and said, “Stop.” After he knew Martinez had left, N. told their mother . . . [who] later called the police.

*Martinez*, No. 2 CA-CR 2006-0019, ¶ 2.

¶4 In his petition for post-conviction relief, Martinez alleged trial counsel had rendered ineffective assistance by not challenging the wording of the indictment charging child molestation as improperly “eliminating the State’s burden of proof on the element of ‘knowingly[.]’” He further alleged appellate counsel had been ineffective in failing to raise the issue as fundamental error on appeal. As a separate issue, Martinez faulted appellate counsel for not contending on appeal that Martinez had been denied due process of law and his constitutional right of confrontation when the trial court prevented defense counsel from questioning the victim about an earlier accusation she had made that a different friend of her brother’s had also “tried to get into her pants.”<sup>1</sup>

¶5 In its minute entry ruling, the trial court first reviewed the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for establishing a claim of ineffective assistance of counsel: a defendant must prove that counsel’s performance fell below prevailing professional norms and must also show a reasonable probability that the outcome of the proceedings would have been different but for counsel’s substandard performance. If a defendant cannot show that prejudice resulted, the court need not determine whether counsel’s performance was actually deficient. *See State v. Salazar*, 146 Ariz. 540, 543, 707 P.2d 944, 947 (1985).

¶6 Here, the trial court assessed Martinez’s contentions and concluded that, even if the performance of trial and appellate counsel had fallen below reasonable professional

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<sup>1</sup>As the court explained in denying post-conviction relief, “the danger of unfair prejudice outweighed the probative value of the victim’s testimony regarding the previous incident, and no evidence or testimony about the prior incident was presented to the jury.”

standards in every instance alleged, Martinez had failed to show any resulting prejudice because the jury had been instructed properly on the elements of the offense. Thus, no burden-shifting had occurred, and there was no reasonable possibility that any flaw in the language of the indictment had led the jury to reach a guilty verdict it would not otherwise have reached. Similarly, the court found that its evidentiary ruling, preventing defense counsel from questioning the victim about an earlier reported molestation, had not affected the outcome of this trial:

The victim's testimony was corroborated by her little b[r]other, who was present at the time of the incident. Therefore, even though the previous accusation may have given the jury a reason to question the victim's honesty, her brother's corroboration would have showed the victim's testimony regarding the Petitioner to be true.

Thus, the court found no basis to conclude the jury would have reached a different verdict, even had trial and appellate counsel raised the objections Martinez contends they should have raised. As a result, Martinez failed to demonstrate a colorable claim of ineffective assistance of counsel.

¶7 We grant the petition for review, but we find no abuse of the trial court's discretion and therefore deny relief.

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CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge